Supreme Court, U.S.
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No. 95-812 (1)

In The

Supreme Court of the United States

October Term, 1995

IN RE: PARK-HELENA CORP. ,

Debtor.

NEBEN & STARRETT, INC.,

Petitioner,

v.

CHARTWELL FINANCIAL CORPORATION.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Bankruptcy Court properly denied attorney's fees and costs to Petitioner law firm for failing to timely disclose the "true source" of the retainer received from Debtor through the Debtor's president where (1) the Petitioner expended considerable time representing the Debtor and would otherwise be entitled to at least a portion of the fees; (2) the Petitioner had a good faith belief that it was in compliance with the statute and rules because the retainer was money "of the debtor"; and (3) the court's narrow interpretation of the meaning of "source" of the funds is contrary to the Congressional intent of the statute.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

In Re PARK-HELENA CORPORATION, Debtor

NEBEN & STARRETT, INC., Petitioner

v.

CHARTWELL FINANCIAL CORPORATION, Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Neben & Starrett, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above entitled proceeding on August 21, 1995.

OPINIONS BELOW

The opinion and judgment of the Ninth Circuit Court of Appeals, dated August 21, 1995, was reported. A copy of the opinion is reproduced in the Appendix at p. 1a. The Order Affirming Judgment of the U.S. Bankruptcy Court made by the United States District Court for the Central District of California, dated January 6, 1994, was not reported. A copy of that Order is reproduced in the Appendix at p. 12a. The Order and Memorandum of Decision, dated March 29, 1993, of the United States Bankruptcy Court was not reported and is reproduced in the Appendix at p. 17a. The Order and Memorandum of Decision on Motion for Reconsideration of Order Denying Fees and Costs Sought by Neben & Starrett, Inc. was entered July 26, 1993. A copy is reproduced in the Appendix at p. 24a.

JURISDICTIONAL STATEMENT

On August 21, 1995, the Ninth Circuit Court of Appeals entered judgment and opinion affirming the action of the United States District Court for the Central District of California which affirmed the judgment of United States Bankruptcy Court.

The jurisdiction of the Court to review the judgment of the Ninth Circuit Court of Appeals is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

11 U.S.C § 329

Fed. R. Bankr. P. 2014.

Fed. R. Bankr. P. 2016.

STATEMENT OF THE CASE

On or about July 17, 1992, the Debtor, Park-Helena Corporation filed a Voluntary Petition under Chapter 11 of the Bankruptcy Code, Case No. SA92-17751-JB.

On or about July 16, 1992, William C. Starrett, II of Neben & Starrett, had a meeting with certain principals of Park-Helena regarding the potential of a Chapter 11 filing. A retainer was discussed at this meeting. Starrett informed Gerald Meyer, president of Park-Helena, that a $150,000 retainer would be required due to the complexity of the case. Meyer replied that the corporation did not have $150,000; however he had $150,000 which he could repay the corporation of monies he had borrowed from the corporation. Meyer wrote a check from his account which was accepted by Starrett. Starrett instructed Meyer to make sure the appropriate entries were made on the books of Park-Helena to reflect that the $150,000 retainer payment was a payment from Park-Helena. This documentation did occur.

On or about July 16, 1992, after the meeting with Neben & Starrett, Gerald Meyer went to the corporate office and summarized the loans made to him from Park-Helena. Meyer reported to the directors of Park-Helena that out of the $1,350,000 loan made to him from Park-Helena he had repaid $200,000 to Park-Helena, paid $150,000 to Neben & Starrett on behalf of Park-Helena, and paid $10,000 to Jon Stuhley. Meyer executed a note for $990,000 representing the balance of the loan made from Park-Helena to Meyer. The Chapter 11 Trustee found evidence of the above documentation and declared as follows:

> Meyer executed a Promissory Note on July 16, 1992 in favor of the Debtor in the amount of $990,000 in consideration for the funds advanced. Documentation attached to the Promissory Note lists offsets of (1) repayment of $200,000 to the Debtor by Meyer; (2) $150,000 paid to Neben & Starrett, Inc.; (3) $10,000 paid to Jon Stuhley. (Declaration of Ronald L. Durkin, Chapter 11 Trustee).

On or about July 16 or 17, 1992, a meeting where all the directors were present, with the exception of Mr. Keppel who was present via telephone, occurred. At this meeting, Starrett informed all the directors of potential conflicts in the case and recommended that they each seek separate counsel. All the directors did seek separate counsel. All the directors were made aware that the payment of a retainer had been made and where the money came from. Meyer, as president of Park-Helena, was authorized to file the Chapter 11 Bankruptcy.

On or about August 11, 1992, Neben & Starrett, Inc.'s employment as counsel to the Debtor and Debtor-in-Possession was authorized by an Order of the Bankruptcy Court. Attached to the Application for Employment was the mandatory declaration of disinterest where the retainer was disclosed as being paid by the Debtor and that Neben & Starrett did not have connections with creditors.

On or about September 3, 1992, a Chapter 11 Trustee was appointed. The Trustee was made aware of the existence of the retainer, where it came from, and the amount.

Substantial representation occurred between July 17 and November 30, 1992. On or about December 4, 1992, Neben & Starrett filed its Application for Compensation as attorneys for the Debtor, Park-Helena. Fees requested were in the amount of $72,430.35 and costs in the amount of $2,066.95, for a total of $74,497.30.

On or about December 11, 1992, Chartwell filed its Objections to Neben & Starrett's Application for Compensation alleging that Neben & Starrett accepted a payment in the amount of $150,000 from Meyer resulting in an undisclosed conflict. A supplemental declaration and reply to Chartwell's objections to the Application for Compensation was filed on or about December 18, 1992. The declaration clarified that the retainer was funds of the Debtor, had always been treated as funds of the Debtor, and that the check from Meyer was a partial repayment of a debt Meyer owed the Debtor.

On or about December 22, 1992, the Honorable James N. Barr of the United States Bankruptcy Court heard argument pertaining to Chartwell's objection to Neben & Starrett's fees. The above facts were explained to the court. Starrett explained that at the time the retainer was required, Park-Helena had insufficient funds and that Meyer had agreed to repay part of his debt to Park-Helena in order to satisfy the amount of the retainer. Starrett stated,

> Although it was Mr. Meyer's draft, it was concurrent with a credit given by the company to him for the repayment of those monies. They, in fact, are, were and at all times the company's monies. (Transcript of Proceedings, p. 28-29).

It was also argued that the payment directly from Meyer was not disclosed in the employment application because Neben & Starrett treated it as a credit of the company's money. Starrett argued that Neben & Starrett could have required Meyer to deposit the check into the company's account and then written a company check, but the urgency of the case required direct payment and immediate credit on the company's books. (Transcript of Proceedings, p. 30).

On or about March 31, 1993, the Bankruptcy Court entered its Memorandum of Decision Re Allowance of Fees and Reimbursement of Costs Sought by Neben & Starrett, Inc. and entered an Order thereon. The Bankruptcy Court found that Neben & Starrett did not make the proper disclosures under 11 U.S.C. § 329 and the Federal Rules of Bankruptcy Procedure, 2014 and 2016. The court found that substantial proof existed that Neben & Starrett did not make the proper disclosures under 11 U.S.C. § 329 and the Federal Rules of Bankruptcy Procedure 2014 and 2016. Rule 2016 (Application for Compensation or Reimbursement) requires an attorney representing a debtor to file a statement setting forth the amount of compensation and the source of the compensation. Rule 2014 (Application for and Order of Employment) requires an attorney to submit a verified statement listing any connection with the debtor, creditor, or any party in interest. The Bankruptcy Court stated that even if Neben & Starrett believed that Meyer's payment was a repayment of his debt to Park-Helena, it would not excuse Neben & Starrett from disclosing the "true source" of the retainer. The court denied all fees and expenses based upon the firm's failure to timely disclose the source of the retainer.

On or about April 9, 1993, Neben & Starrett filed a Motion for Reconsideration of Order Re: Allowance of Fees and Reimbursement of Costs Sought by Neben & Starrett. A hearing was held on May 18, 1993. The court emphasized that it did not believe the firm ever represented Meyer, but rather the court was denying the fees because the firm failed to disclose that the retainer came to the firm through Meyer. (Transcript of Proceedings, p. 3-4,).

The court stated, "you did not reveal in your application for employment or in your application for fees that you had received a payment directly from Meyer." (Transcript of Proceedings, p. 4-5). The court, in response to a question by Starrett, added that "you must reveal the actual source. If money was handed you by an individual, that's what you must reveal..." (Transcript of Proceedings, p. 25). Starrett emphasized that "it was property of the debtor, that [the firm] believed it was property of the debtor at the time and that the debtor believed it was property of the debtor at the time." (Transcript of Proceedings, p. 26).

After the hearing, the Bankruptcy Court took the matter under submission. On July 26, 1993, the Bankruptcy Court entered an Order on the Motion for Reconsideration. The court again found that Neben & Starrett failed to comply with 11 U.S.C. § 329 and Federal Rules of Bankruptcy Procedure, Rules 2014 and 2016. Neben & Starrett filed Notices of Appeal on August 4, 1993 and August 5, 1993.

On January 6, 1994, the District Court affirmed the Bankruptcy Court's judgment. (Appendix p. 12a). The District Court found that "the retainer was not from property of PHC [Park Helena Corporation]. Therefore, PHC was not the source of the compensation." (Appendix p. 14a).

Neben & Starrett appealed to the United States Court of Appeals for the Ninth Circuit. In its brief, the firm emphasized that the lower courts were using an unjustifiably narrow construction of the word "source" of compensation. The firm further argued that the issues presented for review are based upon the Bankruptcy Court's statutory interpretation of what "source" means under 11 U.S.C. § 329 and the Federal Rules of Bankruptcy Procedure, Rules 2014 and 2016. Therefore, the legal conclusion ought to be reviewed *de novo* by the court. (Opening Brief of Appellant, p. 2-3).

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the United States District Court for the Central District of California on August 21, 1995. The Appeals Court stated that "the question here is whether Neben & Starrett's failure to provide the details of the payment constituted a violation of the section 329 and Rule 2016 disclosure requirements. We hold that it does." (Opinion, p. 10339, Appendix p. 6a). The court further held that "even if Neben & Starrett's acceptance of a check from Meyer did not create any actual conflict of interest, Neben & Starrett's failure to describe the circumstances of the payment violated Rule 2014's disclosure requirements." (Opinion, p. 10342, Appendix p. 9a).

Neben & Starrett filed this Petition for Writ of Certiorari on November 20, 1995.

REASONS FOR GRANTING THE WRIT

1. The decisions of the lowers courts on what is required to comply with the statute and rules are contrary to Congressional intent.

2. The courts are unreasonably requiring debtor's attorneys to investigate the genesis of the retainer funds rather than accepting the word of the debtor's president and principal, resulting in far reaching consequences.

3. The Court's guidance is needed to establish a consistent statutory interpretation of what "source" means under 11 U.S.C. § 329 and the Federal Rules of Bankruptcy Procedure, Rules 2014 and 2016.

The parties and courts in this matter have not found any cases on point which define "source" as it is used in 11 U.S.C. § 329. We therefore look to the history and Congressional intent behind the statute and rules to discern their purpose. The House Report, which accompanied H.R. 8200, states in pertinent part:

> This section, derived in large part from current Bankruptcy Act section 60d, requires the debtor's attorney to file with the Court a statement of the compensation paid or agreed to be paid to the attorney for services in contemplation of and in connection with the case, and the source of the compensation. Payments to a debtor's attorney provide serious potential for evasion of creditor protection provisions of the bankruptcy laws, and serious potential for overreaching by the debtor's attorney and should be subject to careful scrutiny. (H.R. Rep. No. 595, 95th Cong., 1st Sess. 329

(1977); S. Rep. No. 989, 95th Cong., 2d Sess. 39 (1978).

It was never argued nor ever found that Neben & Starrett's retainer was obtained due to overreaching methods, or was used by the Debtor to hide assets. In fact, full disclosure was made in the corporate records indicating the existence of the loan between the debtor and Meyer and the payback of part of the loan to satisfy the necessity of the retainer for the upcoming Chapter 11 filing.

Revealing the source of the retainer helps to achieve the purpose of the statute to the extent that a potential conflict would be disclosed through revealing the source. The conflict between Neben & Starrett's definition of "source" (meaning monies of the debtor), and the courts use of "source" (meaning monies from the debtor), has raised a serious conflict which should be reviewed by this Court.

Neben & Starrett have continually explained that they were under the belief that the retainer they were given was money of the debtor. In fact, the Chapter 11 Trustee sued Meyer to recover the remainder of the outstanding loan and obtained a judgment against him. This augments the argument that the money received by Neben & Starrett was properly money "of the debtor." Additionally, Chartwell has argued that Meyer "stole" the money from the Debtor. If the monies were stolen, then the money was always money "of the debtor."

The evidence clearly demonstrates that Meyer executed a promissory note on July 16, 1992 in favor of the Debtor to reflect the remainder of the loan balance. The difference between the $1,350,000 loan and the $990,000 note was explained as (1) repayment of $200,000 to the debtor by Meyer; (2) $150,000 paid to Neben & Starrett;

and (3) $10,000 paid to Jon Stuhley. The Trustee found evidence of these transactions.

The Bankruptcy Court used a restrictive construction of the word "source" to mean "from the debtor." As a result, the court found a Rule 2016 violation for failing to disclose the source of the funds and consequently, a Rule 2014 violation for failure to report the firm's "connection" with Meyer, a creditor of the debtor.

The Bankruptcy Court is using a legal definition which is without foundation in the body of the statute or in its history. The Bankruptcy Court made it clear during the hearing for the Motion for Reconsideration that it was not concerned with whether the money was of the debtor, but rather "the important part of the revelation is where you receive the money." (Transcript of Proceeding, p. 25). During the hearing, the following exchange took place which emphasizes this point:

THE COURT: No, what knowledge did you have that the monies you received in the retainer, the $150,000, was actually money from the debtor as you represented it to be?

MR STARRETT: I hope Your Honor is not very, very particularly choosing the word "from."

THE COURT: Absolutely.

MR. STARRETT: Okay.

THE COURT: I'm particularly choosing that word. (Transcript of the Proceedings, p. 19).

Starrett corrected the court and stated, "it is not funds from the debtor. It is funds of the debtor." (Transcript of Proceedings, p. 20).

Further evidence that the court used a "from the debtor" definition is in the Memorandum of Decision for the Motion for Reconsideration. The court stated that even if Neben & Starrett had a good faith belief that the money was "of the debtor" it "would not excuse the firm's failure to disclose that the retainer check was actually from Meyer and that the check was drawn on Meyer's personal account." (Appendix p. 29-30a). The Bankruptcy Court's opinion requires a debtor's attorney to investigate the true source of funds received. The conflict created by the lower courts legal definition of source puts a further investigatory burden on debtor's attorneys to discover the genesis of the retainer funds received lest they be stripped of those earned monies, as occurred here. Additionally, the court did not appear to consider the purpose and history of 11 U.S.C. § 329 and its Rules when making a determination of what "source" means.

No guideline is available as to what further scrutiny or questioning the attorney is required to do, if any, regarding the actual genesis of the funds. The court's definition of "source" provides no further safeguards to protect the debtor or the creditors than Neben & Starrett's interpretation of "source" as being property "of" the debtor. For example, the Petitioner illustrated that the principal of the debtor could write a check to the debtor, deposit the check in the company's account and then write a company check to the firm. (Opening Brief of the Appellant, p. 18). This would fall within the court's definition of source being "from" the debtor. The court explicitly stated that this would be acceptable under its definition of "source." (Transcript of Proceedings, p. 26).

Numerous cases where a violation of failing to reveal the source of funds were found and are discussed in the Opening Brief of Appellant on Appeal From District Court's Decision Affirming Bankruptcy Court's Order Denying Fees. (Opening Brief of the Appellant, p. 24-28). For the most part, these cases demonstrate intentional misconduct and conflicts, as well as overreaching which is detrimental to the estate as well as the debtor. That did not occur in this case. The "violation" of Rule 2016 was technical. It was merely a result of a discrepancy between the firm and the court regarding the meaning of "source." The Rule 2014 appears to be solely a result of the Rule 2016 violation. The court created a "connection" between the firm and Meyer when it stated there was a Rule 2016 violation. This generated a Rule 2014 violation. Neben & Starrett's only connection with Meyer was as president of the debtor corporation.

The Court of Appeals for the Ninth Circuit reviewed the judgment of the lower courts for an abuse of discretion in denying the attorney's fees. The court did not address whether the funds were or were not Park-Helena's. As a result, the court did not address the primary issue here: whether the courts are applying the correct legal standard. The court stated, "[r]egardless of whether the funds used were, in some sense, Park-Helena's funds, the question here is whether Neben & Starrett's failure to provide the details of the payment constitutes a violation...." (Appendix p. 6a). Additionally, the court stated, "even if the retainer was paid out of funds ultimately belonging to Park-Helena...failure to describe the circumstances of the payment violated Rule 2014's disclosure requirement." (Appendix p. 9a). The court concludes that the Bankruptcy Court did not abuse its discretion is denying attorney's fees for the resultant "violation."

In contrast, the Bankruptcy Court was clear in which legal definition of "source" it was using. The Circuit Court of Appeals did not address whether the proper standard was used by the lower courts. As a result, the most important issue in this case has never been reviewed properly.

The court cited many cases of Rule 2014 and 2016 violations. None are on point with this case. Rather than address the legal issue of the legal definition of "source," the court addresses whether the Bankruptcy Court was within its discretion to deny fees. It is without argument that a court is almost always within its discretion to deny fees where there is a violation. However, the Petitioner here argues that there was no violation because the courts have been applying the wrong standard in determining if a violation exists.

CONCLUSION

The Petitioner requests review before this Court in order to clarify the debtor attorney's legal duty under 11 U.S.C. § 329 and its accompanying Rules.

These issues are important in the administration of the bankruptcy laws and have far reaching consequences for debtors and their attorneys. *See*, Reading Co. v. Brown, 391 U.S. 471 (1967).

The Petition for certiorari should be granted.

Respectfully submitted,

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November 20, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: PARK-HELENA CORP.,
Debtor.

No. 94-55686

NEBEN & STARRETT, INC.,
Plaintiff-Appellant,
v.
CHARTWELL FINANCIAL CORPORATION,
Defendant-Appellee.

D.C. No.
CV-93-00847-LHM
OPINION

Appeal from the United States District Court
for the Central District of California
Linda H. McLaughlin, District Judge, Presiding

Argued and Submitted
June 8, 1995--Pasadena, California

Filed August 21, 1995

Before: Betty B. Fletcher, Charles Wiggins,
and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

COUNSEL

Lisa A. Roquemore, Neben & Starrett, Newport Beach, California, for the plaintiff-appellant.

Leonard M. Shulman, Marshack & Goe, Santa Ana, Califor
nia, for the defendant-appellee.

OPINION

WIGGINS, Circuit Judge:

OVERVIEW

The bankruptcy court denied all fees and costs requested by the law firm of Neben & Starrett, which represents the debtor, Park-Helena Corporation. The bankruptcy court found that Neben & Starrett had violated various bankruptcy statutes and court rules by willfully failing to disclose (1) the source of a $150,000 retainer paid to the firm, and (2) the firm's connections to a related party. We have jurisdiction pursuant to 28 U.S.C. S 158(d), and we affirm.

FACTS

On July 16, 1992, William Starrett (a partner in Neben & Starrett) received from Gerald Meyer (president of Park-Helena) a $150,000 retainer. The retainer was in contemplation of Park-Helena's chapter 11 bankruptcy filing. Meyer wrote a $150,000 check out of his personal account, and the check was accepted by Starrett as a retainer.

Neben & Starrett completed an Application for Employment, pursuant to Fed. R. Bankr. P. 2014, in which the firm stated that it received a retainer from Park-Helena and did not have connections with Park-Helena's creditors. The bankruptcy court approved

Neben & Starrett's employment as Park-Helena's counsel on August 11, 1992.

On December 4, 1992, Neben & Starrett filed an Application for Compensation, in which the firm again indicated that it had received a retainer from "the Debtor," i.e., Park-Helena Neben & Starrett requested a total of $74,497.30, to be offset against the $140,900.75 that remained of the previously received retainer.[1] Park-Helena's major creditor, Chartwell Financial Corp. ("Chartwell"), objected to the fee request. Chartwell alleged, inter alia, that Park-Helena violated 11 U.S.C. S 329 and Fed. R. Bankr. P. 2014 and 2016 by failing to disclose that Meyer, rather than Park-Helena, had paid the retainer to Starrett out of Meyer's personal account. Neben & Starrett argued that Meyer's payment was, in effect, a payment from Park-Helena because Meyer had previously received a $1.35 million "loan" from Park-Helena[2] and his $150,000 payment to Neben & Starrett was credited toward his debt.

The bankruptcy court concluded that Neben & Starrett had violated section 329 of the Bankruptcy Code and Federal Rules of Bankruptcy Procedure 2014 and 2016 by failing to disclose (1) the true source of the retainer, and (2) the firm's connections to Meyer. The bankruptcy court granted Neben & Starrett's motion for reconsideration, but again found that Neben & Starrett had violated section 329 and Rules 2014 and 2016. The court also found that Neben & Starrett may have been aware of an attempt by

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[1] The firm had already applied $9,099.25 in pre-petition fees against the retainer. That amount is not at issue in this case.

[2] Park-Helena authorized a loan of up to $1.5 million, but Meyer actually received only $1.35 million.

Park-Helena to deplete the assets of the bankruptcy estate. Accordingly, the court found that Neben & Starrett's failure to disclose was willful, and the court denied Neben & Starrett's entire fee request. The district court affirmed, holding that the bankruptcy court's conclusion was not clearly erroneous.

DISCUSSION

I. STANDARD OF REVIEW

This court is in " `as good a position to review the bankruptcy court's decision as is the district court.' " Sousa v. Miguel (In re United States Trustee), 32 F.3d 1370, 1372 (9th Cir. 1994) (quoting Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants), 754 F.2d 811, 814 (9th Cir. 1985)).

Therefore, this court "reviews the bankruptcy court's decision independently." Allred v. Kennerley (In re Kennerley), 995 F.2d 145, 146 (9th Cir. 1993). The bankruptcy court's findings of fact are reviewed for clear error and its conclusions of law are reviewed de novo. Sousa, 32 F.3d at 1372. The court's decision about the proper amount of legal fees to be awarded is reviewed for an abuse of discretion. In re Film Ventures Int'l, Inc., 75 B.R. 250, 253 (Bankr. 9th Cir. 1987).

II. DISCLOSURE OF THE SOURCE OF THE RETAINER

The bankruptcy court must ensure that attorneys who represent the debtor do so in the best interests of the bankruptcy estate. See In re Lincoln N. Assocs., Ltd., 155 B.R. 804, 808 (Bankr. E.D. Mass. 1993); In re EWC, Inc., 138 B.R. 276, 280-81 (Bankr. W.D. Okla.

1992). The court must ensure, for example, that the attorneys do not have interests adverse to those of the estate, 11 U.S.C. S 327, that the attorneys only charge for services that benefit the estate, Pfeiffer v. Couch (In re Xebec), 147 B.R. 518, 523 (Bankr. 9th Cir. 1992), and that they charge only "reasonable" fees, 11 U.S.C. S 329(b) To facilitate the court's policing responsibilities, the Bankruptcy Code and Federal Rules of Bankruptcy Procedure impose several disclosure requirements on attorneys who seek to represent a debtor and who seek to recover fees. See 11 U.S.C. S 329; Fed. R. Bankr. P. 2014 & 2016. The disclosure rules impose upon attorneys an independent responsibility. Thus, failure to comply with the disclosure rules is a sanctionable violation, even if proper disclosure would have shown that the attorney had not actually violated any Bankruptcy Code provision or any Bankruptcy Rule. In re Film Ventures Int'l, 75 B.R. at 252.

[1] When a debtor's attorney seeks compensation for fees,Federal Rule of Bankruptcy Procedure 2016(a) requires the attorney to file an application that includes "a statement as to what payments have theretofore been made or promised. . . , [and] the source of the compensation so paid or promised." Regardless of whether fees are actually sought, 11U.S.C. S 329 requires the attorney to "file with the court a statement of the compensation paid or agreed to be paid, . . .and the source of such compensation."3

[2] Neben & Starrett's disclosures pursuant to 11 U.S.C.S 329 and Fed. R. Bankr. P. 2016 stated that the firm received a $150,000 retainer "paid by the Debtor," i.e., Park-Helena The firm did not initially explain that the payment was actually made by Park-Helena's president, Meyer, out of Meyer's personal checking account. It only

disclosed these details after Chartwell objected to Neben & Starrett's fee request. Neben & Starrett argues that the distinction between Meyer and "the Debtor" is one of form over substance because Meyer's personal check reflected funds that he owed to Park-Helena.Thus, according to Neben & Starrett, the retainer was paid with funds "of the debtor," and the statement in the Application for Employment, that Neben & Starrett received a retainer "paid by the debtor," was accurate and sufficient.

[3] We reject this argument. Regardless of whether the funds used to pay the retainer were, in some sense, Park-Helena's funds, the question here is whether Neben & Starrett's failure to provide the details of the payment constitutes a violation of the section 329 and Rule 2016 disclosure requirements. We hold that it does. A fee applicant must disclose "the precise nature of the fee arrangement," and not simply identify the ultimate owner of the funds. See In re Glenn Elec. Sales Corp., 99 B.R. 596, 600 (D.N.J. 1988); see also In re Bob's Supermarket's, Inc., 146 B.R. 20, 25 (Bankr. D. Mont. 1992) (" `[D]ebtor's counsel [must] lay bare all its dealings . . . regarding compensation . . . . Counsel's fee revelations must be direct and comprehensive. Coy or incomplete disclosures . . . are not [3] sufficient.' ") (quoting In re Saturley, 131 B.R. 509, 516-17 (Bankr. D. Me. 1991)), aff'd in part and rev'd in part, 165 B.R. 339 (Bankr. 9th Cir. 1993); In re Plaza Hotel Corp., 111 B.R. 882, 883 (Bankr. E.D. Cal.) ("the duty is one of complete disclosure of all facts") (emphasis added), aff'd, 123 B.R. 466 (Bankr. 9th Cir. 1990); In re B.E.S. Concrete Prods.,

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[3] The disclosure requirements of Rule 2014, which applies to the attorney's Application for Employment, are addressed in part III, infra

Inc., 93 B.R. 228, 237 (Bankr. E.D. Cal. 1988) ("The burden is on the person to be employed to come forward and make full, candid, and complete disclosure.") (emphasis added).

[4] The disclosure rules are applied literally, even if the results are sometimes harsh. See In re Plaza Hotel, 111 B.R. at 883. Negligent or inadvertent omissions "do not vitiate the failure to disclose." In re Maui 14K, Ltd., 133 B.R. 657, 660 (Bankr. D. Haw. 1991); In re Coastal Equities, Inc., 39 B.R 304, 308 (Bankr. S.D. Cal. 1984). Similarly, a disclosure violation may result in sanctions "regardless of actual harm to the estate." In re Maui 14K, 133 B.R. at 660.

[5] Neben & Starrett's failure to describe the transaction and indicate that Meyer paid the retainer out of his personal account constitutes a violation of 11 U.S.C. S 329 and Fed. R. Bankr. P. 2016. Our holding does not impose any new or additional investigatory burden on firms that represent a debtor. A law firm must at least disclose the facts of the transaction, as those facts were known to the firm. This Neben & Starrett failed to do. Because Neben & Starrett did not disclose known facts, we need not decide in this case whether the obligation should be even broader than that.

III. DISCLOSURE OF CONNECTIONS WITH THE DEBTOR

[6] The bankruptcy court found that Neben & Starrett's conduct also violated Fed. R. Bankr. P. 2014(a), which requires that a firm's Application for Employment disclose "all of the [applicant's] connections with the debtor, creditors, [or] any other party in interest . . . ."

This rule assists the court in ensuring that the attorney has no conflicts of interest and is disinterested, as required by 11 U.S.C. Sec. 327(a). The bankruptcy court found a Rule 2014 violation because Neben & Starrett failed to disclose that Meyer, who was a "party in interest,"[4] paid the $150,000 retainer to Neben & Starrett out of his personal account.[5]

The disclosure requirements of Rule 2014 are applied as strictly as the requirements of Rule 2016 and section 329, described above. See, e.g., In re Haldeman Pipe & Supply Co., 417 F.2d 1302, 1304 (9th Cir. 1969) ("General Order 44 [the precursor to Rule 2014] does not give the attorney the right to withhold information because it is not apparent to him that there is a conflict."); In re Hathaway Ranch Partnership, 116 B.R. 208, 219 (Bankr. C.D. Cal. 1990) ("All facts that may be pertinent to a court's determination of whether an attorney is disinterested or holds an adverse interest to the estate must be disclosed.") (emphasis added); In re EWC, 138 B.R. at 280-81 ("The duty of professionals is to disclose all connections with the debtor, debtor-in-possession,

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[4] Meyer held 23.5% of Park-Helena's shares and allegedly was indebted to Park-Helena for a $1.35 million loan.

[5] Neben & Starrett argues that it is unclear whether the bankruptcy court's conclusion that the firm violated Rule 2014 was based on a finding that there was, in fact, a conflict of interest, or on a finding that Neben & Starrett did not make an adequate disclosure. The court's statements, however, clearly indicate that it made the latter finding: The court stated there was insufficient proof that a conflict actually existed, and the court expressly found a violation of "Rule 2014," which is purely a disclosure requirement.

insiders, creditors, and parties in interest . . . . They cannot pick and choose which connections are irrelevant or trivial. . . . No matter how old the connection, no matter how trivial it appears, the professional seeking employment must disclose it."); In re B.E.S. Concrete Prods., 93 B.R. at 236 ("Appearances count. Even conflicts more theoretical than real will be scrutinized.").

[7] Like the disclosure provisions of 11 U.S.C. S 329 and Rule 2016, the provisions of Rule 2014 impose an independent requirement on attorneys. See In re Film Ventures Int'l, 75 B.R. at 252; In re EWC, 138 B.R. at 280-81. Thus, even if the retainer was paid out of funds ultimately belonging to Park-Helena, and even if Neben & Starrett's acceptance of a check from Meyer did not create any actual conflict of interest, Neben & Starrett's failure to describe the circumstances of the payment violated Rule 2014's disclosure requirements.

IV. DENIAL OF FEES

[8] Even a negligent or inadvertent failure to disclose fully relevant information may result in a denial of all requested fees. In re Maui 14K, 133 B.R. at 660; In re Coastal Equities, 39 B.R. at 308. The bankruptcy court in this case concluded that Neben & Starrett's failure to disclose fully the circumstances surrounding payment of the retainer was not negligent or inadvertent, but willful. This finding is not clearly erroneous. There can be no doubt that the firm did know all of the salient facts regarding the payment of the retainer but chose not to reveal them. Moreover, he bankruptcy court permissibly discounted the evidence that tended to show a lack of willfulness, i.e., the affidavit of Darrell Townsend, a member of the Park-Helena Board of Directors, because

his affidavit exhibited inconsistencies and generally incredible assertions.

[9] The court's denial of all fees was within its discretion. See In re Crimson Investments, 109 B.R. 397, 402 (Bankr. D. Ariz. 1989) (failure to disclose forthrightly source of compensation warranted denial of all compensation); In re Hathaway Ranch, 116 B.R. at 220 (applicant who fails to provide complete disclosure may be ordered to disgorge previously paid compensation).

CONCLUSION

The bankruptcy court's order denying Neben & Starrett's entire fee request is AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NO. 94-55686
CT/AG#: CV-93-00847-LHM

In re: PARK-HELENA CORP.

Debtor

NEBEN & STARRETT, INC.
Plaintiff - Appellant

v.

CHARTWELL FINANCIAL CORPORATION
Defendant - Appellee

APPEALS FROM the United States District Court for the Central District (Santa Ana).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District (Santa Ana) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered August 21, 1995.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO. SACV 93-847 LHM
Date 1/6/94

DOCKET ENTRY

PRESENT:

HON. LINDA E. MCLAUGHLIN, JUDGE

SHERYL RITCHEY	NONE PRESENT
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:
None Present

ATTORNEYS PRESENT FOR DEFENDANTS:
None present

PROCEEDINGS: BANKRUPTCY APPEAL

IN CHAMBERS:

The Court , on its own motion, hereby VACATES the APPELLANT'S hearing on 1/10/94 F.R.Civ.P. 78; Local Rule 7.11. Based on the papers submitted by the parties and applicable law, the Court now rules as follows:

(1) The Court has read and considered Appellants' opening Brief and the Notice of Errata Regarding Appellants'

Excerpts of Record on Appeal by Appellant, and the Excerpts of Record on Appeal by Appellee.

(2) The judgment of the Bankruptcy Court for the Central District of California contained in the Memorandum of Decision on Motion for Reconsideration of Order Denying Fees and Costs Sought by Neben & Starrett for Services as Counsel for Debtor in Possession, dated July 21, 1993, is affirmed.

(3) The Court makes the following findings on this appeal.

(i) This Court properly has jurisdiction of this appeal.

(ii) The Bankruptcy court granted the Motion for Reconsideration and did not alter its original findings and conclusions upon reconsideration. Amended Excerpts of Record on Appeal by Appellant [hereinafter E.R. A'nt] Exhibit 10, at 334.

(iii) The decision of the Bankruptcy Court was not a decision as to whether to reconsider the motion, and therefore is reviewed for its decision on the merits, using the standard of review applicable to a decision that debtor's counsel had failed to show that the source of its retainer had been properly disclosed pursuant to 11 U.S.C. Sec. 329 and F.R. Bankr. P. Rule 2016 and that all connections with the debtor, creditors, or interested parties had been properly disclosed pursuant to F.R. Bankr. P. Rule 2014.

(iv) The check with which the funds were paid was drawn on Meyer's checking account. For this payment to be property of Park-Helena Corp. (PHC), there must have been an actual loan from PHC to Meyer, the payment to Appellants must have been in repayment of this loan, and

PHC must have accepted this as repayment. If all of these elements are not present, Meyer is using his own funds to pay not present, Meyer is using his own funds to pay Appellants' retainer, and PHC is not the source of the property because the property is not even property of the debtor.

(v) The bankruptcy court found that Appellants failed to meet their burden of proof by a preponderance of the evidence of each of the three elements required for the retainer payment to be property of PHC. E.R. A'nt Exhibit 3, at 191, and was explicitly reaffirmed upon reconsideration. Id. Exhibit 10, at 338-39. See generally id. Exhibit 10. The court further found that there was no good faith belief by Appellants that the retainer payment was from property of PHC. Id. Exhibit 10, at 338-39. These factual findings are based in part on the bankruptcy court's assessment of credibility. See id. Exhibit 10.

(vi) As factual findings, the findings of the bankruptcy court listed above, as well as all other findings it made, can only be set aside if clearly erroneous. F.R. Bankr.P. Rule 8013; see F.R. Civl.P. Rule 52. These findings are supported by substantial evidence from the conflicting evidence in the record. They are not clearly erroneous. The portions of the Memorandum of Decision quoted on pages 15 through 18 of Appellee's Opening Brief are specifically approved as showing that these findings are supported by substantial evidence.

(vii) In its disclosures to the Court required by 11 U.S.C. Sec. 329 and F.R. Bankr.P. Rule 2016, Appellants stated that the source of the compensation they were receiving was a retainer from PHC. As detailed above, the retainer was source of the compensation and Appellants failed to make F.R> Bankr. P. Rule 2016. Additionally,

such failure was willful as Appellants had no good faith belief in the truth of what was stated in this regard in the Application for Employment and the Application for Compensation.

(viii) The willful failure to make proper disclosure is itself a proper ground to disallow all costs and fees applied for. In fact, this was explicitly stated by the bankruptcy court as the ground for disallowing all fees and costs to Appellants, E.R. A'nt Exhibit 3, at 191, and was explicitly reaffirmed upon reconsideration. Id. Exhibit 10, at 334.

(ix) Counsel for Appellants has pointed out numerous cases where fees and costs were denied for violations of Sec 329 and Rule 2016 that involved fraud on creditors. That was found here by the bankruptcy court. "[T]he new evidence presented by (Appellants) suports the conclusion that the debtor was playing a game of hide-the-cash with at least one of its creditors." E.R. A'nt Exhibit 10, at 338. That finding is not clearly erroneous.

(x) the bankruptcy court was correct in denying fees for willful violation of Sec 329 and Rule 2016. See, e.g., In re Crimson Investments, N.V., 109 B.R. (Bankr. D. Ariz. 1989); cf. In re national Distributors Warehouse Co, 140 B.R. 558 (Bankr. E.D. Ark. 1992) (negligent failure to make proper disclosure is proper ground for disgorgement of fees.) See generally 11 U.S.C.A. Sec 329 nn. 57, 65; F.R. Bankr. P.Rule 2016 n. 11 (U.S.C.A.)

(xi) As the bankruptcy court was correct in denying fees for willful violations of Sec. 329 and Rule 2016, the Court affirms the judgment below on that ground. The Court does not need to reach the alternate issues presented, of whether there was violation of F.R. Bankr. P. Rule 2014

or whether disallowance of fees would be proper if there were good faith belief that Meyer was authorized to repay the loan by paying the retainer, or whether Appellants would be required to state in the disclosure statements that the check came directly from Meyer if he was authorized to so repay, and the Court therefore does not reach these issues and expresses no opinions on them. Nothing in this Minute Order should be taken to express any position on the merits of any of the issues raised in this appeal and mentioned in the preceding sentence.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	)
PARK-HELENA	)
CORPORATION.	) Case No. SA 92-17751JB
	) Chapter 11
	)
	) MEMORANDUM OF DECISION
	) RE: ALLOWANCE OF FEES
	) AND REIMBURSEMENT OF
Debtor	) COSTS SOUGHT BY NEBEN &
_____	) STARRETT

Neben & Starrett (the "Firm") applied for allowance of fees and reimbursement of costs in the amount of $72,430.35 and $2,066.95, respectively, for legal services rendered to Park-Helena Corporation (the "Debtor") from July 16, 1992 through November 30, 1992.

Chartwell Financial Corporation ("Chartwell"), a creditor of the estate, filed an objection to the fee application and the Chapter 11 Trustee (the "Trustee") filed a joinder without further support or written argument.

In addition to reviewing the pleadings filed in connection with the Firm's fee application, I also reviewed the court tile in this case to determine the merits of Chartwell's objections. Among other things, the file revealed that this bankruptcy case was commenced by the Debtor on July 17, 1992. Approximately two months

later, I entered an order granting the United States Trustee's ex parte motion appointing a Chapter 11 Trustee.

"BENEFIT TO THE ESTATE" ANALYSES

Chartwell asks that I disallow certain fees sought by the firm for services which were not reasonable or necessary and/or that did not benefit the estate. I find that the Firm has proven that the work it did in connection with the Trustee's Motion for Use of Cash Collateral falls within the definition of "benefit to the estate" espoused by the court in In re Xebec, 147 B.R. (Bankr. 9th Cir. 1992). The Debtor's pleadings as to that motion were more extensive than those of the Trustee and presented different points for my consideration. Those services did not obstruct or impede the administration of the estate and they were consistent with the Debtor's duties under 11 U.S.C. Sec.521(3).[1]

However, the Firm's actions in prosecuting a motion for reconsideration of my order appointing a trustee in this case did not benefit the estate. If the Firm and the Debtor's officers had a good faith belief that the appointment of a trustee was detrimental to the estate and if there were support for that concern, then it could be said that such a motion fits within the definition of "benefit to the estate" set forth in Exebec, supra. However, because appointment of a trustee does not necessarily lead to cessation of operations of a debtor and does not obviate retention of the debtor's management team (a fact apparently presupposed the Firm in its motion for reconsideration), I did not find such support in the

[1] Unless otherwise noted, all references are to Title 11 of the United States Code.

motion reconsideration. I find that the prosecution of that motion did not benefit the estate but was, instead interposed primarily for the benefit of the officers/ shareholders of the Debtor. Such is not consistent with the Debtor's duties under section 521.

I have reached the same conclusion about the Firm's motion for a protective order as to Chartwell's examination of members of the Firm under Federal Rule of Bankruptcy Procedure 2004. The fact that I denied that motion does not weigh heavily in making my findings in that regard because the outcome of a motion well made for a proper purpose does not control the determination of allowability of fees for the effort. However, in this instance, the motion was not meritorious and smacked of an attempt to protect the Debtor from the prying eyes of its creditors. That is not consistent with the Debtor's duties under section 521 and did not benefit the estate in any respect.

As to Chartwell's references to the Firm's alleged billing discrepancies (aggregating $526.00), I find the Firm's explanations credible and sufficient to overcome Chartwell's objections. However, I find the charges asserted by the Firm for inter-office conferences were excessive. Specifically, I find that seven hours of conferencing was reasonable throughout the period covered by the present fee application and that a blended rate of $225.00 an hour should be applied to that time to arrive at a reasonable fee for those services. However, for the reasons noted below, I will not allow any fees or reimbursement of costs to the Firm because of its failure to timely disclose the true source of the retainer it received in connection with this case.

FAILURE TO DISCLOSE

Chartwell asked that I disallow all of the Firm's requested fees and costs because: (i) the Firm is not a "disinterested person" under section 327(a) in that it received a pre-petition retainer from Gerald Meyer {"Meyer"}, an officer and shareholder of the Debtor; and (ii) it failed to timely disclose the source of that retainer.

Chartwell failed to prove that the Firm was not a "disinterested person" under section 327(a). However, there is substantial proof that the Firm did not make the proper disclosures under section 329 and Federal Rules of Bankruptcy Procedure 2014 and 2016.

Under section 329 and Federal Rule of Bankruptcy Procedure 2016, an attorney representing a debtor must file a statement setting forth the amount of compensation received or promised for his services and the source of that compensation. Federal Rule of Bankruptcy Procedure 2014 requires an attorney seeking approval of employment to submit a verified statement listing any connections with the debtor, creditors, any party in interest, their respective attorneys or accountants, the United States Trustees or any person employed by the Office of the United States Trustee.

Numerous courts have held that an attorney who fails to comply with the above-described statute and rules may be denied all compensation. In re Film Ventures Intern., Inc., 75 B.R. 250 (Bankr. 9th Cir. 1987) (Failure to comply with section 329 is grounds for denial of compensation wholly apart from the act of representing conflicting interests); In re Vann, 136 B.R. 863 (Bankr. D. Colo. 1992) (Non-compliance with Federal Rule of

Bankruptcy Procedure 2016 will support a total denial of fees even if non-compliance is inadvertent or unintentional); In re Hathaway Ranch Partnership, 116 B.R. 208 (Bankr. C.D. Cal. 1990) (Lack of disclosure under Federal Rule of Bankruptcy Procedure 2014 may result in denial and disgorgement of compensation).

The Firm filed a statement (the "Statement") in compliance with section 329 and Federal Rule of bankruptcy Procedure 2016(b) in which it stated that the Debtor had paid or planned to pay the Firm a retainer in the amount of approximately $150,000. However, in the Firm's reply to Chartwell's opposition, William Starrett ("Starrett"), a partner at the Firm, admitted for the first time that Meyer paid the $150,000 retainer to the Firm from his personal account. Starrett also stated that Meyer offered to pay the retainer as repayment of a loan he had received from the Debtor because the Debtor did not have sufficient funds to pay the retainer. Starrett then instructed Meyer to "make sure he made the appropriate entries on the Park-Helena Corporation [sic] books that such $150,000 retainer payment was in fact a payment from Park-Helena."

It is clear from Starrett's testimony that the Firm violated section 329 and Federal Rule of Bankruptcy Procedure 2016 by misrepresenting the source of the retainer payment in the Statement. The firm did not argue that the misrepresentation was inadvertent and the proof is to the contrary. Instead, the Firm apparently seeks vindication by contending that I should consider the retainer a payment from the Debtor. To do that, I would have to ignore the fact that Meyer actually paid the retainer. Moreover, even if the Firm believed that Meyer's payment was actually repayment of his debt to

the Debtor[1] it would not be excused from disclosing the true source of the retainer.

The Firm also failed to comply with Federal Rule of Bankruptcy Procedure 2014. Lisa Roquemore, a partner at the Firm, filed a declaration in support of the Debtor's application to employ the Firm in which she testified that she did not have any connections with the Debtor, its creditors, the United States Trustee, any party in interest or their respective attorneys or accountants. According to the Debtor's Statement of Financial Affairs, which was prepared by the Firm, Meyer held 23.5% of the Debtor's shares in July, 1992. Moreover, by his own admission, Starrett was informed that Meyer was indebted to the Debtor when the retainer was paid. Therefore, at the time that it sought approval of its employment, the Firm knew that Meyer was a party in interest. Nevertheless, the Firm did not disclose receipt of its retainer from Meyer when it sought approval of its employment or when it applied for allowance of fees and reimbursement of expenses. Based on the Firm's failure to timely disclose the source of its retainer payment and because I find that omission willful, I will disallow all fees and reimbursement of costs sought by the Firm.

Date: 3/29/93 /s/

James N. Barr
United States Bankruptcy
Judge

[1] Such a belief would not be reasonable because there is no evidence to indicate that the Debtor agreed to treat Meyer's payment to the Firm as a repayment of his debt to the Debtor or that the Debtor would have paid any monies that it received from Meyer to the Firm.

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	)
PARK-HELENA	)
CORPORATION.	) Case No. SA 92-17751JB
	) Chapter 11
	)
	)
	) ORDER RE: ALLOWANCE OF
	) FEES AND REIMBURSEMENT
	) OF COSTS SOUGHT BY
Debtor	) NEBEN & STARRETT
_____	)

In accordance with my Memorandum of Decision of this date, IT IS HEREBY ORDERED that Neben & Starrett's application for allowance of interim fees and reimbursement of costs is denied.

Date: 3/29/93 /s/

_____

James N. Barr
United States Bankruptcy
Judge

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	)
PARK-HELENA	)
CORPORATION.	) Case No. SA 92-17751JB
	) Chapter 11
	)
	) MEMORANDUM OF DECISION
	) ON MOTION FOR
	) RECONSIDERATION OF
	) ORDER DENYING FEES AND
	) COSTS SOUGHT BY NEBEN &
	) STARRET FOR SERVICES AS
	) COUNSEL FOR THE DEBTOR
	) IN POSSESSION.
Debtor	)
_____	)

JURISDICTION

This court has jurisdiction over this case pursuant to 11 U.S.C. Sec. 1334(a) (the district courts shall have original and exclusive jurisdiction of all cases under Title 11), 28 U.S.C. Sec157(a) (authorizing the district courts to refer all Title 11 cases and proceedings to the bankruptcy judges for the district) and General Order No. 266, dated October 9, 1984 (referring all Title 11 cases and proceedings to the bankruptcy judges for the Central District of California). This matter is a core proceeding pursuant to 28 U.S.C. Sec. 157(b)(2)(B).

Neben & Starrett ("the firm") sought allowance and payment of $72,430.35 fees and reimbursement of $2,066.95 costs, for legal services as counsel for the debtor in possession ('the debtor") from July 16, 1992 through November 30, 1992. Chartwell Financial Corporation ("Chartwell"), a creditor of the debtor, ad the Chapter 11 Trustee ("Trustee") objected. I overruled many of the objections, but denied the firm all fees and costs after finding that it had failed to comply with the disclosure requirements of section 329 of the Code, [1] and F.R.B.P. 2014 and 2016.[2]

The firm then filed a timely motion for reconsideration, of my order to that effect, under provisions of Rule 59, F.R. Civ. P. and Rule 60 (b); and over Chartwell's objections I have reconsidered the firm's fee application. I did so to determine if the proof offered by the firm in its motion, led to conclusions contrary to those I drew from its initial fee application. I find insufficient proof within the Motion for Reconsideration to alter those original findings and conclusions; and will, therefore, again deny allowance of all fee and costs sought by the firm in this case.

However, so saying does not provide a complete explanation of my ruling on the Motion for Reconsideration. The firm offered additional proof in that motion to support its right to fees and costs from the

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[1] Use of the phrase, "the Code," is a refernce to the provisions of Title 11, United States Code, also known as The Bankruptcy Code.

[2] Use of the abbreviation "F.R.B.P." is a reference to the Federal Rules of Bankruptcy Procedure.

bankruptcy estate; and the firm is due an explanation of the effect of that proof on the outcome of its motion.

The firm offered the declaration of Gerald Meyer, president of the debtor.[3] Chartwell objected to that declaration on various evidentiary grounds. I have overruled most of those objections, but have sustained hearsay objections to statements allegedly made by Meyer to Starrett at or about the time the retainer was paid and statements about approval of certain transactions by the

debtor's Board of Directors.[4] I will not consider those statements as proof of their truth. However, I have considered Meyer's statements to Starrett as evidence ofthe latter's state of mind at the time the firm applied for approval of its employment by the debtor in this case and at the time the firm applied for its fees and costs.[5] Although no valid evidentiary objections were made to them, I find other statements in Meyer's declaration of

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[3] It was Meyer who delivered his personal check for $150,000.00 directly to William Starrett, a partner of the firm, which the firm treated as its retainer in this case.

[4] Hearsay objections have been sustained to the second (last) sentence of paragraph 8 and the entirety of paragraph 10 of the Gerald Meyer declaration. All other evidentiary objections by Chartwell to that declaration have been overruled.

[5] As noted in my previous Memorandum of Decision, the firm failed to disclose certain facts about receipt of its retainer in its application for approval of employment and in its original fee application. Chartwell brought out the truth in its objections to the firm's fee application.

doubtful credibility and worthy of little weight in this matter.

For instance, Meyer testified that on or about June 29, 1992 (just two weeks before the commencement of the debtor's bankruptcy case), the debtor loaned him 1.5 million dollars. He goes on to testify that "as a condition of the loan, [he was] required to obtain Park-Helen [sic] Director approval of all funds used by me from the loan proceeds on behalf of Park-Helena in payment of any Park-Helena debt." However, it is clear from the declaration of Darrell Townsend, a member of the debtor's Board of Directors (offered by the firm in support of its Motion for Reconsideration), that pre-approval of expenditures of the proceeds of that loan was not one of the "conditions of the loan;" and it is just as clear that no such pre-approval was obtained. In addition, although Townsend testified that one of the reasons for making the 1.5 million dollar loan to Meyer was "to fund the costs of litigation to stop Mr. Joseph Aaron in his threats to disrupt the activities of PHC and Kyst, Inc. (the sole shareholder of the debtor)," no admissible evidence was offered to explain why the debtor used Meyer for that purpose.[6] In fact, Starrett's own declarations in this matter tend to establish that the firm's retainer was not paid by Meyer in furtherance of that objective and in accordance with "conditions of the loan;" for according to Starrett, when Meyer gave him the

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[6] Although in paragraph 4 of the Townsend declaration, he testified that the firm was consulted about Aaron's threat, Chartwell objected to consideration of that entire paragraph on the ground that it was inadmissible hearsay. I have sustained that objection, and will not consider the statements made in that paragraph to prove the truth thereof.

retainer, Meyer said that the debtor did not have the funds to pay the firm at that time, but he (Meyer) owed the debtor the amount of the retainer and would pay it himself.[7] That is not the statement of one who is paying the debtor's debts at the direction and under the control of the debtor's Board of Directors. I draw that conclusion despite the testimony of Gerald Meyer that "[he] wrote a check to Neben & Starrett from my personal account because that's where the funds were located for Park-Helena at that time." Such contradictions do not serve the firm well in this matter, and I find the declaration of Gerald Meyer generally incredible.

As to the declaration of Darrell Townsend, I have overruled Chartwell's hearsay objection to a portion of paragraph 4 of his declaration to the effect that on July 16, 1992 (the date the retainer was paid to the firm), Meyer provided a summary of "advances received from and paid back to PHC, and executed a note for $990,000.00 (referring to copy of a promissory note from Meyer to the debtor dated July 16, 1992)..." But as to the remainder of Townsend's testimony about actions of the debtor's diretors, their reasons for doing so and their instructions to Meyer with regard to documenting the firm's retention by the debtor, contained in the last three sentences of paragraph four and in the last four sentences of paragraph five of his declaration, I have sustained Chartwell's hearsay and lack of foundation objections.

One of the attachments to the Townsend declaration is a purported accounting from Gerald Meyer

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[7] I note that in the portion of Gerald Meyer's declaration which was successfully objected to as hearsay, and which I have not considered as evidence here, he reiterated Starrett's testimony about that conversation.

to the debtor's Board of Directors, It is entitled "PHC Account with Gerald Meyer;" and it recites that on July 16, 1992, i.e., on the date Meyer paid the firm a retainer of $150,000.00, Meyer borrowed that same amount from the debtor. Then there is the promissory note from Meyer to the debtor, signed and delivered on July 16, 1992, in the principle amount of $990,000.00. Apparently that sum was determined by giving Meyer credit for (a) repayment to the debtor of $200,000.00 of the 1.5 million dollar loan (or is it 1.35 million dollars as expressed in the Meyer's accounting), (b) payment of $10,000.00 to another bankruptcy attorney in this area (Jon Stuhley), and (c) the $150,000.00 retainer to the firm. However, the first part of the loan to Meyer was apparently made on July 8, 1992 (according to Meyer's accounting to the debtor's Board), over a week before the note was signed and the rather substantial loan was ostensibly ratified by the Board.

In all, the new evidence presented by the firm supports the conclusion that the debtor was playing a game of hide-the-cash with at least one of its creditors. But Meyer and Townsend scrupulously avoid admitting that outright. they cling to their somewhat tenuous story of loans to Meyer and repayments, which the firm would have me accept as support for the firm's claim to fees.

In fact, there is some admissible proof in Townsend's declaration that Starrett was present at meetings with the Board when they authorized the firm's employment and impliedly approved payment of the retainer.[8] If believed, such testimony might be sufficient

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[8] Although statements made by Darrell Townsend in his declaration, about what was said at meetings of members of the debtor's Board of Directors on July 16, 1992, and on July 17, 1992, are inadmissible hearsay,

to sustain the conclusion that Starrett had a good faith belief that the retainer was from funds of the debtor. It would not excuse the firm's failure to disclose that the retainer check was actually received from Meyer and that the check was drawn on Meyer's personal account; but it would tend to disprove willfulness. However, the incredibility of Meyer's and Townsend's testimony about a purported "loan" to Meyer only days before seeking bankruptcy relief, taints the entirety of their testimony.

In addition, Starrett's testimony in support of the firm's fee application does not support Townsend's testimony about the meetings with debtor's Board members on either July 16, 1992 or on July 17, 1992. In Starrett's declaration he sets forth in detail the hours he and his associates devoted to representation of t he debtor in this case. He testified that on July 16, 1992 he devoted 1.5 hours to a conference with Gerald Meyer and Lisa Roquemore, one of the firm's associates. There is no mention of a meeting with Mr. Schmitz (another director of the debtor) that day, with regard to threats Schmitz had received from Aaron, contrary to Townsend's testimony to that effect. Nor is there mention in Starrett's declaration about a meeting in his office with the debtor's

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statements within that same testimony to the effect that Starrett was present at those Board Meetings are not excluded from my consideration by any of Chartwell's evidentiary objections. And although Townsend's statements as to ratification of Meyer's accounting for "loan" proceeds and employment of the firm as bankruptcy counsel is not admissible to prove the truth of ratification and employment approval, they are admissible to prove Starrett's knowledge and good faith belief that Meyer was authorized to act on behalf of the debtor when he paid the firm's retainer.

Board Members on July 17, 1992; despite the fact that in that declaration Starrett devoted nearly twenty pages to a detailed daily breakdown and explanation of the need for every hour of legal services for which fees are sought by the firm.

In his declaration, Gerald Meyer does testify about a a meeting on July 16, 1992 with Starrett and Richard Schmitz; and in inadmissible testimony, Meyer said that Schmitz and Townsend "approved [the transactions referred to in Meyer's July 16, 1992, accounting] as required."

However, there is not enough credibility or consistency in the proof presented in the firm's Motion for Reconsideration to warrant acceptance of the Firm's argument that it's failure to disclose the true source of its retainer was not willful.

Date: 7/21/93 /s/

James N. Barr
United States Bankruptcy
Judge

UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA

In re:	)
PARK-HELENA	)
CORPORATION.	) Case No. SA 92-17751JB
	) Chapter 7
	)
	) ORDER RE:
	) MOTION FOR
	) RECONSIDERATION OF
	) ORDER DENYING FEES AND
	) COSTS SOUGHT BY NEBEN &
	) STARRET
	)
Debtor	)
_____	)

In accordance with my Memorandum of Decision rendered this date,

IT IS HEREBY ORDERED that the Motion for Reconsideration of my order denying allowance of fees and costs sought by Neben & Starrett is granted; but

IT IS FURTHER ORDERED that upon reconsideration the firm is again denied fees and costs from this bankruptcy estate.

Date: 7/21/93 /s/

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James N. Barr
United States Bankruptcy
Judge

11 U.S.C § 329

(a) Any attorney representing a debtor in a case under this title, or in connection with such a case, whether or not such attorney applies for compensation under this title, shall file with the court a statement of the compensation paid or agreed to be paid, if such payment or agreement was made after one year before the date of the filing of the petition, for services rendered or to be rendered in contemplation of or in connection with the case by such attorney, and the source of such compensation.

(b) If such compensation exceeds the reasonable value of any services, the court may cancel any such agreement, or order the return of any such payment, to the extent excessive, to--

(1) the estate, if the property transferred--

(A) would have been property of the estate; or

(B) was to be paid by or on behalf of the debtor under a plan under chapter 11, 12, or 13 of this title; or

(2) the entity that made such payment.

Fed. R. Bankr. P. 2014.

Fed. R. Bankr. P. 2016.

Rules 2014

EMPLOYMENT OF PROFESSIONAL PERSONS

(a) *Application for and Order of Employment.* An order approving the employment of attorney's, accountants, appraisers, auctioneers, agents, or other professionals pursuant to Sec 327, Sec 1103, or Sec 1114 of the Code shall be made only on application of the trustee or committee. The application shall be filed and, unless the case is a chapter 9 municipality case, a copy of the application shall be transmitted by the applicant to the United States trustee. The application shall state the specific facts showing the necessity for the employment, the name of the person to be employed, the reasons for the selection, the professional services to be rendered, any proposed arrangement for compensation, and, to the best of the applicant's knowledge, all of the person's connections with the debtor, creditors, any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee. The application shall be accompanied by a verified statement of the person to be employed setting forth the person's connections with the debtor, creditors, or any other party in interest, their respective attorneys and accountants, the United States trustee, or any person employed in the office of the United States trustee.

(b) *Services Rendered by Member or Associate of Firm of Attorneys or Accountants.* If, under the Code and this rule, a law partnership or corporation is employed as an attorney, or an accounting partnership or corporation is employed as an accountant, any partner, member, or regular associate of the partnership, corporation or

individual may act as attorney or accountant so employed, without further order of the court.
Rule 2016.

COMPENSATION FOR SERVICES RENDERED AND REIMBURSEMENT OF EXPENSES

(a) Application for Compensation or Reimbursement. An entity seeking interim or final compensation for services, or reimbursement of necessary expenses, from the estate shall file an application setting forth a detailed statement or (1) the services rendered, time expended and expenses incurred, and (2) the amounts requested. An application for compensation shall include a statement as to what payments have therefore been made or promised to the applicant for services rendered or to be rendered in any capacity whatsoever in connection with the case, the source of the compensation previously received has been shared and whether an agreement or understanding exists between the applicant and any other entity for the sharing of compensation received or to be received for services rendered in or in connection with the case, and the particulars of any sharing of compensation or agreement or understanding therefor, except that details of any agreement by the applicant for the sharing of compensation as a member or regular associate of a firm of lawyers or accountants shall not be required. The requirements of this subdivision shall apply to an application for compensation for services rendered by an attorney or accountant even though the application is filed by a creditor or other entity. Unless the case is a chapter 9 municipality case, the applicant shall transmit to the United States trustee a copy of the application.

(b) *Disclosure of Compensation Paid or Promised to Attorney for Debtor.* Every attorney for a debtor, whether

or not the attorney applies for compensation, shall file and transmit to the United States trustee within 15 days after the order for relief, or at another time as the court may direct, the statement required by Sec. 329 of the Code including whether the attorney has shared or agreed to share the compensation with any other entity. The statement shall include the particulars of any such sharing or agreement to share by the attorney, but the details of any agreement for the sharing of the compensation with a member or regular associate of the attorney's law firm shall not be required. A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.